

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

EDWARD R. COSS, JR.,

Petitioner

v.

LACKAWANNA COUNTY DISTRICT
ATTORNEY and THE ATTORNEY
GENERAL OF THE COMMONWEALTH
OF PENNSYLVANIA,

Respondents

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1:CV-94-1481

(CHIEF JUDGE VANASKIE)

MEMORANDUM

Petitioner Edward R. Coss, Jr., is presently serving a nine (9) month parole violation sentence. He has petitioned for release from confinement under Sup. Ct. R. 36.3(b) and Fed. R. App. P 23(c), which call for release on personal recognizance, with or without surety, pending further court review of a decision ordering release. The unusual aspect of Coss' petition is that the conditional order of release that is pending review by the United States Supreme Court and on which he relies did not address the validity of the revocation of Coss' parole or the parole violation sentence. Nor did it address the validity of the 1993 aggravated assault conviction for which he was under the jurisdiction of the Pennsylvania Board of Probation and Parole at the time his parole was revoked. Instead, the conditional release order was based on findings that (a) a separate conviction in 1986 was unconstitutional, and (b) the six (6) to twelve (12) year sentence Coss received in 1993 for aggravated assault may have been adversely influenced by consideration of the 1986 conviction. The conditional release order directs that the

Commonwealth of Pennsylvania either re-try Coss on the 1986 conviction, and if Coss is acquitted, re-sentence him on the aggravated assault conviction; or re-sentence Coss on the 1993 aggravated assault conviction without considering the unconstitutional 1986 conviction. The premise of Coss' petition for release is his anticipation that when the proceedings concerning his 1986 conviction have run their course he will receive a sentence of less than six (6) to twelve (12) years on his 1993 conviction.

Having conducted an evidentiary hearing on Coss' petition for release and having carefully considered the applicable authorities and the parties' respective arguments, I find that the factors governing issuance of a stay of a judgment in the context of habeas corpus relief – likelihood that the petitioner will remain incarcerated after correction of the constitutional error, irreparable harm to the Commonwealth, the interests of other parties, and the public interest – weigh in favor of maintaining Coss in custody.

First, although Coss may arguably avoid the jurisdiction of the Pennsylvania Parole Board if the maximum on his 1993 aggravated assault sentence is reduced to less than eight (8) years, the likelihood of that occurrence is so remote as to make his immediate release inappropriate. By way of illustration, if Coss is re-sentenced to the minimum period in the applicable Pennsylvania sentencing guideline range – four (4) to eight (8) years – the Parole Board would have jurisdiction over Coss until March of 2001, and its decision to revoke parole and sentence Coss to nine (9) months in prison would not be subject to challenge. Thus, if Coss were released now and able to convince a state judge to reduce his sentence to four (4) to eight (8)

years, he would still have to return to prison to complete the service of his parole violation sentence. Because the Commonwealth has shown a strong likelihood that Coss will be re-sentenced within the standard sentencing range, I find that release is not warranted.

Second, Coss is currently in custody as a consequence of violating the terms and conditions of his parole. Because the Parole Board indisputably had jurisdiction over Coss when it revoked parole and sent him to prison for nine (9) months, Coss' current confinement is independent of the 1993 sentence he is hopeful will be reduced. The interests of both the Parole Board and the general public in enforcing the terms and conditions of parole would be undermined by allowing Coss to evade the consequences of his parole violation. Furthermore, it would offend principles of federalism to release Coss simply because his 1993 sentence may be reduced when the validity of the decision of the Pennsylvania Parole Board has not been called into question.

Finally, I find that there is a sufficient risk of flight to justify denial of release. Coss was a fugitive from justice on his aggravated assault charges for more than one (1) year. His parole violation was sufficiently serious to warrant a nine (9) month jail term. He has remaining about five (5) months on his parole violation sentence. Given Coss' prior fugitive status and his parole violation history, I believe there is a significant risk that if Coss must return to jail to complete his parole violation term, he will abscond. Under these circumstances, denial of the request for release is appropriate.

I. Background

Coss petitioned for a writ of habeas corpus on September 15, 1994. (Dkt. Entry 1.) He challenged not the conviction for which he was imprisoned (an aggravated assault conviction), but a 1986 conviction for simple assault on which he contended the sentencing court relied when it sentenced him to eight (8) to twelve (12) years for the aggravated assault offense.¹ On June 8, 1998, I denied Coss' petition. (Dkt. Entry 100.) Coss appealed that denial, and on February 29, 2000, our Court of Appeals, proceeding en banc, remanded with instructions that this Court issue Coss a conditional writ of habeas corpus. Coss v. Lackawanna County District Attorney, 204 F.3d 453, 467 (3d Cir. 2000).²

At the time that the Third Circuit issued its decision, on February 29, 2000, Coss had

¹ Coss was actually sentenced twice on the aggravated assault conviction. In sentencing Coss to eight (8) to twelve (12) years the first time, the state court relied on an inaccurate pre-sentence report. Subsequently, the Pennsylvania Superior Court vacated the sentence and remanded for resentencing. Commonwealth v. Coss, 449 Pa. Super. 718, 674 A.2d 313 (1995). On March 27, 1996 the sentencing court re-sentenced Coss to the same prison term of seventy-two (72) to one hundred forty-four (144) months.

² The Third Circuit explicitly held that the writ was not unconditional:

Therefore, we will condition the entry of the writ by extending to the Commonwealth the option of conducting a new trial. If this new trial produces a verdict different from the prior verdict, the state must re-sentence Appellant to account for any enhancement due to this guilty verdict.

...

The Commonwealth also has the option of not affording a new trial and merely proceeding into re-sentencing on the 1993 conviction.

Coss, 204 F.3d at 467 (internal notes omitted) .

been paroled on his 1993 aggravated assault sentence.³ As a condition of his parole, Coss was released to a community confinement center in Wernersville, Pennsylvania ("Wernersville"). As another condition of his parole to Wernersville, Coss was required to successfully complete the center's program. On April 20, 2000, the center terminated Coss from the program for failing to obey the center's rules and regulations, and he was again incarcerated.⁴ On June 7, 2000, his parole was revoked and he was ordered to serve nine (9) months for his failure to complete Wernersville's program. He is now eligible for parole in January of 2001.

On May 24, 2000, the Commonwealth petitioned for a writ of certiorari to the United States Supreme Court. A decision as to whether the certiorari will be granted is not expected until October of 2000, at the earliest.

On July 10, 2000, Coss moved that he be released pending the Supreme Court's decision whether to grant certiorari. The Commonwealth opposes Coss' petition. On August 10, 2000, an evidentiary hearing was conducted. The motion for release is now ripe for disposition.

II. Discussion

A. Standard of Review

Coss cites United States ex rel. Thomas v. State of New Jersey, 472 F.2d 735 (3d Cir.),

³ Coss was paroled on January 10, 2000.

⁴ At the evidentiary hearing, the parties contested the fairness of Coss' termination from the program and his ensuing incarceration for using racial epithets; however, both sides agreed that Coss failed to obey the rules and that he had, in fact, been terminated from the program.

cert. denied, 414 U.S. 878 (1973), for the proposition that the Third Circuit's decision granting habeas corpus relief creates a presumption that he should be released while the Commonwealth attempts to overturn that decision. In conjunction with that argument, he suggests that Sup. Ct. R. 36.3(b) and Fed. R. App. P. 23(c) apply to his situation. (Dkt. Entry 115 at 2-3.) Rule 36.3(b) of the Supreme Court Rules, in pertinent part, reads: "Pending review of a decision ordering release, the prisoner shall be enlarged on personal recognizance or bail, unless the court, Justice, or judge who entered the decision, or the court of appeals, this Court, or a judge or Justice of either court, orders otherwise." Rule 23(c) of the Federal Rules of Appellate Procedure, in pertinent part, reads:

While a decision ordering the release of a prisoner is under review, the prisoner must -- unless the court or judge rendering the decision, or the court of appeals, or the Supreme Court, or a judge or justice of either court orders otherwise -- be released on personal recognizance, with or without surety.

The Commonwealth counters that "the proper vehicle for review in this case is Supreme Court Rule 36.3(a) and Federal Rule of Appellate Procedure 23(b)." (Dkt. Entry 122 at 5.) Rule 36.3(a) of the Supreme Court Rules addresses a petitioner's release during appeal when a court has made a decision "failing or refusing to release a prisoner" Rule 23(b) of the Federal Rules of Appellate Procedure similarly concerns an appeal after a court's "decision not to release a prisoner" There is an important difference between the two "sets" of rules. The rules that Coss argues apply contain a presumption of release, and the rules for which the Commonwealth argues do not.

In Thomas, the Third Circuit addressed facts almost identical to those sub judice. Our Court of Appeals first noted two types of habeas relief, conditional and unconditional, and went on to hold:

Where a state prisoner has obtained from a district court a decision that his state confinement is unlawful, he is entitled to an order that such confinement be ended. The district court's final order may be in one of two forms. It may unconditionally order the prisoner's release, or it may order his release at some time in the near future if, in the meantime, he has not been afforded a new trial. Either form of order is appealable. In the typical new trial type order, such as is here appealed from, the time fixed for a new trial will be considerably shorter than the time periods fixed in the Federal Rules of Appellate Procedure for docketing, briefing and arguing an appeal. Thus, either type of order, if the state appeals, will present the issue of custody of the petitioner pending appeal. The practice in such cases is governed by Rule 23(c), Fed. R. App. P.

Id. at 742. See also Jago v. United States Dist. Court, 570 F.2d 618, 620 (6th Cir. 1978).

In Thomas, the court granting the writ had given the state the option of re-trying the petitioner. In the matter sub judice, the Court of Appeals ordered this Court to grant Coss' writ with the condition that the Commonwealth could, if it chose, either re-try Coss or re-sentence him without relying on the unconstitutional conviction. I find that the holding of Thomas as it relates to Fed. R. App. P. 23(c) applies to this case, and accordingly, I will apply Fed. R. App. P. 23(c), a rule that creates a presumption of release. See Thomas, 472 F.2d at 743 ("[I]t is clear from the history of the rule prior to the 1967 change that there is still a very strong presumption that a petitioner holding a final judgment that his detention is unlawful should not be left in state

custody.”).

A later United States Supreme Court case, Hilton v. Braunskill, 481 U.S. 770 (1987), however, provides the pertinent analytical framework for considering, under Rule 23(c), a respondent's attempt to rebut the presumption of release. Hilton held:

[A] court making an initial custody determination under Rule 23(c) should be guided not only by the language of the Rule itself but also by the factors traditionally considered in deciding whether to stay a judgment in a civil case. There is presumption in favor of enlargement of the petitioner with or without surety, but it may be overcome if the traditional stay factors tip the balance against it. A court reviewing an initial custody determination pursuant to Rule 23(d) must accord a presumption of correctness to the initial custody determination made pursuant to Rule 23(c), whether that order directs release or continues custody, but that presumption, too, may be overcome if the traditional stay factors so indicate.

Id. at 777. The traditional factors controlling the issuance of a stay are

(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Id. Within the context of these traditional factors, the reviewing court may consider the risk of flight and whether there is a danger to the community if the prisoner is released. Id.

B. Rebuttal of the Presumption of Release

1. Traditional Factors Governing Issuance of a Stay

In the case sub judice, the Commonwealth argues that even if the state court were to re-sentence Coss without using the invalidated conviction, Coss would remain in custody because

of two factors: 1) given Coss' considerable criminal history, the state court would be very likely to re-sentence Coss in the standard range, which would result in his being still subject to the jurisdiction of the Pennsylvania Board of Probation and Parole; and 2) because Coss violated his parole by failing to complete the Wernersville program, he remains validly incarcerated until January of 2001.

For purposes of determining whether an inmate with a conditional writ of habeas corpus should be released pending the State's appeals, the penultimate merits issue is not whether the State is likely to obtain a reversal of the judgment finding the conviction unconstitutional, but whether the State will be able to secure an untainted conviction, or, in this case, an untainted sentence of imprisonment that exceeds the duration of the confinement the petitioner has thus far endured. As stated in Walberg v. Israel, 776 F.2d 134, 136 (7th Cir.), cert. denied, 474 U.S. 1013 (1985), "the presumption in Rule 23(c) can easily be rebutted by showing that the state is quite likely to be able to retry, reconvict, and reimprison the applicant, and that therefore he should not be released, the error in his existing incarceration being readily curable."

As Hilton makes clear, a court may properly consider the likelihood that retrial or resentencing would result in continued incarceration. Accordingly, I consider whether the Commonwealth has demonstrated a likelihood that Coss will remain subject to a custodial sentence if the Third Circuit's decision stands.

When Coss returned to Pennsylvania, after serving his sentence in New York for possession of a controlled substance, the Pennsylvania court sentenced him, on April 28, 1993,

to seventy-two (72) to one hundred forty-four (144) months incarceration. The sentence was within the “standard” range of the applicable Pennsylvania sentencing guidelines, which had called for a minimum term of fifty-four (54) to seventy-eight (78) months.⁵ Subsequently, the Pennsylvania Superior Court vacated the sentence and remanded for resentencing.

Commonwealth v. Coss, 449 Pa. Super. 718, 674 A.2d 313 (1995). Elimination of the simple assault conviction from the guideline calculation produced a “standard” range sentence of forty-eight (48) to seventy-two (72) months as the minimum prison term.⁶ On March 27, 1996 the sentencing court re-sentenced Coss, imposing the identical seventy-two (72) to one hundred forty-four (144) months incarceration originally ordered.

The sentence of March 27, 1996 was the focus of Coss’ habeas petition. A majority of the Third Circuit found that the sentencing court relied upon the prior unconstitutional conviction when it meted out Coss’ sentence.

When the state court handed down the March 27, 1996 sentence, it applied the “standard range” of the sentencing guidelines. If the Commonwealth were to re-sentence Coss without use of the invalid conviction, it is likely that the court again will sentence Coss to a period within the

⁵ Under Pennsylvania’s sentencing scheme, the minimum prison term falls within a guideline range. The maximum sentence is twice the minimum.

⁶ The Pennsylvania sentencing scheme also establishes ranges of minimum prison time in a “mitigated” range and in an “aggravated” range. In Coss’ case, the mitigated range calls for a minimum term from 36 to 48 months, and the aggravated range calls for a minimum term from 72 to 90 months.

standard range of the Commonwealth's guidelines. In fact, the seventy-two (72) month minimum sentence was a single day shy of the "aggravated range." While the Third Circuit found that the state court had relied on the prior, unconstitutional conviction when it handed down that sentence, there is little reason to believe that the state court, now considering the same record minus the single conviction, would stray from the standard range. The fact that the court nearly entered the aggravated range buttresses this conclusion. I find no support in the record for the proposition that the sentencing court would be likely to depart below the standard range into the mitigated range. As Judge Nygaard noted in his dissenting opinion in Coss v. Lackawanna County District Attorney:

I part company with the majority over the question of whether the challenged sentence "might have been different if the sentencing judge had known that at least [some] of the respondent's prior convictions had been unconstitutionally obtained." United States v. Tucker, 404 U.S. 443, 448, 30 L. Ed. 2d 592, 92 S. Ct. 589 (1972). On this record, I have no doubt that the sentencing judge would have imposed exactly the same sentence had he known Coss' 1986 conviction for simple assault was constitutionally infirm. Therefore, I respectfully dissent from that portion of the majority's opinion holding that Coss is entitled to habeas relief.

...

Given the nature of Coss' appeal, it is certainly understandable that the focus of attention has been on the challenged 1986 conviction for simple assault. But I take a broader view and include the extensive criminal record that Coss has managed to compile. It starts with a 1980 arrest, when Coss was 11 years old, for recklessly endangering another person. See Presentence Investigation Report at 4, reproduced in Supp. App. at 258. Thereafter, Coss was adjudicated delinquent on five separate occasions (when he was 12, 13, 15 and 16 years old) for, respectively: (1) theft and receiving stolen property; (2) disorderly

conduct and resisting arrest; (3) simple assault; (4) yet another simple assault; and (5) burglary. See id.

As an adult, Coss has been convicted on the aggravated and simple assault charges for which he is currently imprisoned. In separate incidents, he has pleaded guilty to disorderly conduct after being charged with that offense, as well as with hindering apprehension, in 1989. He also pleaded guilty to possession of a controlled substance in 1992 after being charged with that offense, and with reckless endangerment in 1991. In addition, Coss' record at the time of sentencing included: n1

- (1) a 1986 arrest for making terroristic threats;
- (2) a 1988 arrest for aggravated assault and simple assault;
- (3) a 1988 arrest for delivery of a controlled substance (heroin);
- (4) a 1989 arrest for aggravated assault, simple assault, recklessly endangering another person and disorderly conduct;
- (5) another 1989 arrest for aggravated and simple assault;
- (6) yet another 1989 arrest for simple assault as well as for making terroristic threats;
- (7) a 1990 arrest for simple assault and retail theft; and
- (8) a 1990 arrest for retail theft and criminal conspiracy;

n1 Under Pennsylvania law, a sentencing court may consider prior arrests in an offender's record, that did not result in convictions, "so long as the court realizes that the defendant had not been convicted on those prior charges," and does not give them "undue weight."

Id. at 467-69 (citations omitted). Although Judge Nygaard was discussing a new sentence in the context of a constitutional error, his reasoning also applies to the issue of Coss' release during the Commonwealth's appeal, and his reasoning supports the conclusion that the sentencing court is unlikely to depart from the standard range.

Accordingly, I find that the sentencing court is likely to sentence Coss within the standard range. The lowest minimum sentence within that range is forty-eight (48) months. If the court were to prescribe a minimum sentence at the bottom of the standard range, Coss' maximum

sentence would be ninety-six (96) months, or eight (8) years. Thus, even assuming a sentence at the very bottom of the standard range, Coss would remain subject to the jurisdiction of the Pennsylvania parole authorities until March 12, 2001.⁷ Thus, a consideration of the Commonwealth's likelihood of maintaining jurisdiction over Coss militates against his release at this time.

The interests of other parties and the public interest also militate against Coss' release. Coss' current incarceration is due to a judgment of the Pennsylvania Parole Board for conduct found to be a violation of the terms of his parole. The decision of the Parole Board has not been set aside. In Hilton, the Court indicated that a court may properly take into account the "state's interest in continuing custody and rehabilitation pending a final determination of the case on appeal." 481 U.S. at 777. In this case, Coss' parole violation term is a vital component of the Commonwealth's interest in rehabilitating Coss. To release Coss now would intrude impermissibly on the Pennsylvania Parole Board's prerogative to incarcerate a parole violator. A federal court decree that suspends an otherwise valid parole violation judgment would also offend principles of comity and federalism.

At this juncture, the public also has a substantial interest in seeing that the terms of parole are enforced. The remote possibility that Coss may ultimately receive a maximum sentence of

⁷ Giving Coss credit for time served prior to trial, 25 days, his sentencing date would be March 12, 1993. Accordingly he would be subject to parole for ninety-six months from that date, or until March 12, 2001.

less than eight (8) years, thereby ending the jurisdiction of the Pennsylvania Parole Board, does not alter the fact that he violated the terms of his parole at a point in time when he was subject to its jurisdiction. The public interest in having Coss punished for his violation of parole should not be undermined by ordering his release while the Commonwealth's certiorari petition remains pending.

Having carefully considered the traditional factors governing stay of a judgment, I find that the Commonwealth has rebutted the presumption of release. First, there is a strong likelihood that "at the end of the day" Coss will be re-sentenced to a prison term that continues to subject him to the authority of the Pennsylvania Parole Board. Second, the Pennsylvania Parole Board's interest in punishing parole violators and deterring other violations would be undermined by releasing Coss now. Finally, interests of comity and federalism militate against a federal court's interfering with Coss' parole violation sentence.

2. Risk of Flight

Hilton listed risk of flight as one of the pertinent considerations when a court is considering the rebuttal of a presumption of release. 481 U.S. at 777. Coss argued in the evidentiary hearing that he is neither a "flight risk" nor a "danger to the community."⁸ The

⁸ Coss represented to the Court that he would be amenable to electronic monitoring, a third-party custodian, a curfew, and reporting to probation authorities. Coss also has filed documents that represent that he would have full-time employment if he were released. See Ex.
(continued...)

Commonwealth rebutted Coss' assertions with evidence that Coss had at one time been a fugitive.

After the close of evidence in his trial on aggravated assault for which he is presently incarcerated,⁹ but before the jury rendered its decision, Coss absented himself from the state. The court issued a capias for failure to appear for sentencing, and a little more than a year later Coss was arrested in New York on separate charges.¹⁰ He pleaded guilty to possession of a controlled substance, and the New York court sentenced him to sixteen (16) to forty-eight (48) months in prison. Upon his parole on those charges, the authorities returned him to Pennsylvania to serve his sentence on the aggravated assault charge.

Despite his history of flight, Coss represents to this Court that he would not flee if he were released pending the Supreme Court's decision. At the evidentiary hearing on this matter, Coss proffered his history of work release. He contends, and the respondents' witness, David M. Kintzer from the Pennsylvania Board of Probation and Parole, agreed, that while Coss was at Wernersville he worked full-time as a truck driver for a local construction company. During the

⁸(...continued)
A., submitted with Dkt. Entry 115. Finally, family members have agreed to post property and cash as security for Coss' return to confinement should that be necessary.

⁹ Commonwealth v. Coss, No. 89-CR-1371 (Court of Common Pleas, Lackawanna, Pa. Mar. 27, 1996).

¹⁰ Prior to the issuance of the capias for which he was eventually returned to Pennsylvania, the court had issued another capias which the parties later stipulated to dismiss. There is conflicting evidence as to the reason for the issuance for the first capias, but both parties agree that Coss fled the state before the jury returned its verdict.

months of January through April of 2000, Coss always returned to Wernersville as required. Further, Wernersville frequently allowed Coss weekend passes to visit his family in the Scranton area. Again, Coss always returned on time. In one instance, the center allowed Coss a six-day pass to be with his family after the death of a half-brother. Coss returned to Wernersville on time.

To further buttress his contention that he is not a risk of flight, Coss points to extensive family in this District. Both of his parents live in Scranton; he has numerous relatives in the area, and his long-time paramour and their daughter live in Scranton. Last, he notes that if he is released, a local business has promised him full-time employment.

Countering Coss' litany of stabilizing indicia is his documented history of flight from justice. I cannot overlook the fact that Coss fled his trial and remained a fugitive for over a year. Further, he did not voluntarily end his flight; his flight ended only when New York authorities arrested him on new charges. Furthermore, the strong likelihood that the state court will re-sentence Coss to a term within the standard range makes it very likely that he will have to complete his parole violation term. Such an eventuality would give Coss incentive to flee. Accordingly, I find that Coss presents a serious risk of flight. This factor alone warrants denial of his motion for release.¹¹

¹¹ I recognize that Coss' family members have offered to post security for his release. I also recognize that Coss enjoys the strong support of his family. But given his past history, including his violation of parole by conduct that displayed disrespect for authority and racial
(continued...)

III. Conclusion

After careful consideration of the applicable facts and law, I conclude that Coss should remain in custody pending the Supreme Court's decision on whether to grant certiorari. If certiorari is denied, the Commonwealth will be required to move promptly in obeying the terms of the conditional writ of habeas corpus. Coss' status, whether he remains incarcerated on his parole violation warrant or is discharged from confinement and the jurisdiction of the Parole Board, will be determined by that new sentence. An appropriate Order is attached.

Dated: August 23, 2000

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

EDWARD R. COSS, JR.,

Petitioner

v.

**LACKAWANNA COUNTY DISTRICT
ATTORNEY and THE ATTORNEY
GENERAL OF THE COMMONWEALTH
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1:CV-94-1481

(CHIEF JUDGE VANASKIE)

¹¹(...continued)

bigotry, the support of his family does not allay my concerns that, if release is granted and Coss must ultimately return to jail to complete his parole violation sentence, he will not voluntarily return to prison.

Respondents :

ORDER

August 23, 2000

NOW, THEREFORE, for the reasons set forth in the foregoing memorandum, **IT IS**
HEREBY ORDERED THAT:

1. Petitioner's Motion for Release (Dkt. Entry 114) is **DENIED**.

Thomas I. Vanaskie, Chief Judge
Middle District of Pennsylvania

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FILED: 8/23/00